Nos. 11995, 11996, 11997

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11995.

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, etc., R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix, etc.,

Appellees.

No. 11996.

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.,*

Appellees.

No. 11997.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.,*

Appellees.

PETITION FOR REHEARING.

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division

FILED
APR 7 - 1949
PAUL P. O'BRIEN,
CLERK

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IN THE

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MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING. copartners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, copartners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY; JOHN GILBERT RANKIN and R. S. NORSWING, copartners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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Appellees.

PETITION FOR REHEARING.

I.

PRELIMINARY STATEMENT.

This Honorable Court reversed the judgments of the District Court of the United States in and for the Southern District of California, Northern Division, dismissing three suits filed by a foreign administratrix, a foreign executor and an individual citizen of Oregon, against a local executrix and the surviving copartner of the deceased

tortfeasor. The alleged tort was committed in the State of Oregon and two of the suits below were predicated on the wrongful death statutes of that jurisdiction, while the third suit was for personal injuries.

The suits were challenged below and on appeal on the grounds that the complaints failed to state a claim upon which relief could be granted, lack of capacity in the parties plaintiff to maintain the suits, lack of capacity of the parties defendant to be sued and lack of jurisdiction of the subject matter. [R. 11995, 11996, pp. 9-10; R. 11997, pp. 8-9.] This Honorable Court, in its opinion filed March 11, 1949, held that each of the plaintiffs was possessed with a cause of action maintainable against each of the defendants.

This petition for rehearing is respectfully filed on behalf of the defendant R. S. Norswing in each of the three causes of action and on behalf of the defendant Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, deceased, only as to No. 11997.

II.

STATEMENT OF THE CASE.

This petition for rehearing seeks to have this Honorable Court reconsider its opinion on two points of law: (1st) May suit be maintained for wrongful death and negligence against a surviving partner of the alleged tortfeasor who died in the commission of the tort? (2d) May suit for personal injuries be maintained against the executrix of the alleged wrongdoer in the State of California?

III.

SUMMARY OF ARGUMENT.

A. No Suit May Be Maintained for Wrongful Death or for Negligence Against a Surviving Partner of the Alleged Tortfeasor Who Died in the Commission of the Tort.

B. No Suit for Personal Injuries May Be Maintained in the State of California Against the Executrix of the Alleged Wrongdoer.

IV.

ARGUMENT.

A. No Suit May Be Maintained for Wrongful Death or for Negligence Against a Surviving Partner of the Alleged Tortfeasor Who Died in the Commission of the Tort.

This Honorable Court recognized the well-settled rule of law that since the tort complained of was committed in the State of Oregon, reference must be made to the applicable law of that jurisdiction to determine the substantive rights and liabilities of the parties. An examination of that law led this Court to conclude that the plaintiffs could prevail in suits for wrongful death and for personal injuries against the surviving copartner of the alleged tortfeasor who died in the commission of the tort. This conclusion was predicated upon the wrongful death statutes of the State of Oregon (Sec. 8-903 and Sec. 8-904, O. C. L. A.) and upon the Uniform Partnership Act in force in Oregon (Secs. 79-305, 79-307, 79-602, 79-603, 79-608, O. C. L. A.).

Liability of the Defendant R. S. Norswing Under Wrongful Death Statutes of the State of Oregon.

The Survival Statute of the State of Oregon (Sec. 8-904, O. C. L. A.) abrogates the common law rule that a personal right of action dies with the death of the tortfeasor. It designates the statutory defendants vulnerable to suit arising out of injury to the person or death. Under this statute, actions may be maintained only against "the personal representative of the wrongdoer." The applicable substantive law of the *lex loci delicti* gives no right of action against one not alleged to be the personal representative of the wrongdoer. Therefore, no cause of action against the defendant, R. S. Norswing, as the surviving partner of the deceased wrongdoer can be bottomed upon Sec. 8-904, O. C. L. A., without enlarging its scope and adding a class of defendants not specified in the statute. *Cf. Kramer v. San Francisco Market Street Rd. Co.,* 25 Cal. 434 (1864). The California wrongful death statute in effect at the time of the *Kramer* decision designated the "personal representatives of such deceased person" as the only persons who could institute such a cause of action. Stats. 1862, p. 447. In this case, an action was instituted by the father of a minor child who was killed by the alleged negligence of the defendant. A demurrer to the complaint was sustained below and affirmed on appeal, on the sole ground that the plaintiff was not within the statutory designation as the person entitled to maintain the suit. The Court said:

> "The Act of 1862 is in derogation of the common law, and must, therefore, be strictly construed. The cause of action thereby created can be prosecuted only by the persons therein designated. The plaintiff does

not sue as the administrator or executor, but as the father and sole heir of the deceased person. That as 'father and heir' he cannot maintain this action, we have no doubt."

See, also:

Clark v. Goodwin, 170 Cal. 527 (1915).

Accordingly, the defendant R. S. Norswing, as the surviving copartner of the deceased wrongdoer, is not vulnerable to suit in Oregon under the survival statute of that State, for the obvious reason that he is not alleged to be "the personal representative of the wrongdoer." If liability is to attach at all as to the defendant R. S. Norswing, it must attach by reference to some other statute of the State of Oregon.

Liability of the Defendant R. S. Norswing Under the Uniform Partnership Act.

The Uniform Partnership Act in force in Oregon provides that where by any negligence of a partner acting in the course of the business of the partnership loss or injury is caused to any person other than a partner, the partnership is liable to the same extent as the partner so acting; and all partners are liable jointly and severally for such wrongful act. (Secs. 79-305, 79-307, O. C. L. A.) This Honorable Court held that under these statutes a cause of action against a copartner survived the death of the partner alleged to be the tortfeasor.

The Uniform Partnership Act is silent on the subject of survival. In the absence of an express survival provision, it is respectfully submitted that no suit may be maintained against such a surviving partner. The authorities

cited in *Clark v. Goodwin, supra,* are but a few of the many which establish the settled rule of law that in the absence of an express statutory provision providing for survival, actions for wrongful death or personal injuries do not survive the death of the tortfeasor. There is no such express statutory provision in the Uniform Partnership Act and, therefore, no suit may be maintained against a surviving partner for wrongful death or for personal injuries upon the death of the alleged wrongdoer.

> *Sumner v. Brown,* 312 Pa. 124, 167 Atl. 315 (1933).

In the above case the plaintiff was a guest in an automobile driven by Harry R. Brown and was injured in New York as a result of reckless driving. Harry R. Brown, the tortfeasor, was killed in the accident. At the time of this occurrence, Harry R. Brown was a partner of Arthur R. Brown and was engaged in partnership business. Prior to suit being filed, Arthur R. Brown died and the guest then sued in the State of Pennsylvania for personal injuries and joined as defendant "Edith M. Brown, Executrix of the Estate of Arthur R. Brown, surviving partner of Arthur R. Brown and Harry R. Brown, copartners." The plaintiff pleaded the New York Partnership Law, which is the identical provision as Sec. 79-305, O. C. L. A., and judgment was rendered for the defendant, which was affirmed on appeal by the Supreme Court of the State of Pennsylvania. The Court, in its opinion, said:

> "Unless the law of New York provided a right of action for the tort, none exists; without a right of action, the suit must fail; if a right exists, it must

be pleaded. The provisions quoted from the partnership statute* do not provide for the continuation of the common-law liability for personal injury after death of the party liable. For the wrongful act of the partner who drove the car the property of the partnership was answerable (in the words of the statute) 'to the same extent as' he was; but his common-law liability had been terminated with his death. *Moe v. Smiley,* 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341. But, as agent for his copartner, his tort likewise made the property of the partnership answerable, but this liability also terminated by the death of the surviving partner. No right of action remains. . . . By the common law no recovery could be had against the estates of the joint and several tortfeasors."

Therefore, in the absence of an express statutory provision for survival in the Uniform Partnership Act the defendant R. S. Norswing may not be held liable for wrongful death or for personal injuries upon the death of the partner alleged to be the tortfeasor. Such causes of action abated upon the death of the wrongdoer.

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*The New York statute construed in this case is Partnership Law of New York (Consolidated Laws, Ch. 39, Sec. 24), which is as follows:

"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

This Section is word for word with the Oregon statute, Sec. 79-305, O. C. L. A.

B. No Suit for Personal Injuries May Be Maintained in the State of California Against the Executrix of the Alleged Wrongdoer.

In this petition for rehearing, Shirley Lorraine Rankin, as the Executrix of John Gilbert Rankin, the deceased tortfeasor, challenges the existence of a cause of action in the plaintiff, Milton James Scott Thompson, No. 11997, enforceable in the District Court of the United States in and for the Southern District of California.

This plaintiff alleged in his complaint that he was personally injured, and set forth the nature of his personal injuries in Paragraph VIII of his amended complaint. [R. 11997, p. 6.] In Paragraph IX of the said amended complaint, this plaintiff alleged that he had been gainfully employed in the operation of his automobile business, and that as a result of the said accident he was unable to attend to this business for a period of three months.

This Honorable Court held that this cause of action was maintainable against the defendant Shirley Lorraine Rankin, as executrix, on the strength of *Hunt v. Authier,* 28 Cal. 2d 288, 169 P. 2d 913, 171 A. L. R. 1379. and *Moffatt v. Smith,* 87 A. C. A. 877.

In *Hunt v. Authier, supra,* the Supreme Court of this State engrafted an exception to the rule laid down in *Clark v. Goodwin, supra,* and permitted recovery to the plaintiff for the material losses sustained by the widow and her minor children, including the value of future support. In *Moffatt v. Smith, supra,* the plaintiff was a chemical engineer and alleged that as a result of the personal injuries

sustained due to the negligence of the defendant he was prevented from carrying on his occupation and, therefore, suffered a property damage for which the Court permitted recovery.

The plaintiff Thompson, in his complaint, has not alleged a property damage within either the case of *Hunt v. Authier, supra,* or *Moffatt v. Smith, supra.* There is no allegation of loss of future support as defined in *Hunt v. Authier,* nor is there any allegation of the loss of future potential earnings within the rule laid down in the *Moffatt v. Smith* case. This being so, the action must stand as a mere suit for personal injuries which under *Clark v. Goodwin, supra,* would abate upon the death of the tortfeasor. Therefore, this action cannot be maintained in California. To permit such suit would be contrary to the express statutory provisions and general rule of law of this jurisdiction.

> *Loranger v. Nadeau,* 215 Cal. 362 (1932);
>
> *McManus v. Red Salmon Canning Co.,* 37 Cal. App. 133 (1918).

This Honorable Court in its opinion further relied upon and cited the case of *Nash v. Wright,* 82 Cal. App. 2d 475 (1947), and stated that the "tortfeasor died." The tortfeasor in this case was Wright who apparently was still alive when the action was commenced. See *Nash v. Wright,* 82 Cal. App. 2d 467 (1947), 186 P. 2d 686, where the Court said: "Wright having evidently disappeared from the community was not available as a witness."

V.
CONCLUSION.

It is respectfully submitted that the petition for rehearing be granted.

O'CONNOR & O'CONNOR,
By WILLIAM V. O'CONNOR,
Attorneys for Appellees.

Certificate of Counsel.

I, Wllliam V. O'Connor, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

WILLIAM V. O'CONNOR,
Attorney for Petitioner.